



# State of Utah

## GOVERNOR'S OFFICE OF PLANNING AND BUDGET

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Mark S. Delligatti, Sr. Project Manager  
Licensing Section, Licensing & Inspection Directorate  
Spent Fuel Project Office  
Office of Nuclear Material Safety and Safeguards  
US NRC  
Washington DC 20555-0001

Dear Mr. Deligatti:

Re: State Historic Preservation Officer's Response to Proposed Memorandum of Agreement Concerning Historic Preservation Activities on or near the proposed Private Fuel Storage High Level Nuclear Waste Storage Facility in Utah

The State of Utah and the State Historic Preservation Officer have reviewed the draft Memorandum of Agreement concerning historic preservation activities on or near the proposed high level nuclear waste storage facility within the State of Utah. We have serious concerns regarding the draft MOA, and do not believe it correctly reflects the law, nor proper procedure. These defects are fundamental, and jurisdictional, to one of the proposed parties - the Bureau of Land Management - and perhaps to others. The state of Utah believes the proposed MOA is prematurely proposed, and cannot be executed at this time. Our concerns are summarized as follows:

1. The MOA requires agreement with a conclusion which, by factual timing within the regulatory process, is not true. The first paragraph ("Whereas") states that the NRC, BIA, BLM, and STB "propose to approve" the PFS project described in the preferred alternative of the Environmental Impact Statement (EIS). Although it is true that the parties "propose to approve" the proposed project, such approval is not yet given. Pending the final decision on the EIS and the final project description, it is illegal for the agencies to act to in any manner to implement a "preferred" alternative.
2. The BLM has responsibility for management of federal lands in Skull Valley, including those lands identified in the proposed rail and the proposed intermodal transfer facilities.

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However, the BLM has not yet amended the Pony Express Area Resource Management Plan (RMP) to allow for any aspect of the proposed project, including the actions proposed in this MOA. Further, the proposed MOA constitutes a planning activity by BLM, and contemplates numerous additional planning activities on the part of the BLM. Congress has prohibited the BLM from conducting any planning activities, or implementing any planning activities, or amending any RMPs until a full review and evaluation of those impacts on the Utah Test and Training Range is completed. Hence, BLM is precluded from participating in the activities contemplated by this MOA, and in executing the MOA.

3. Automatic, inflexible, presumptive triggers in the MOA would operate in violation of BLM regulation and policy. BLM is required to make reviews and affirmative decisions if a plan or action is to be authorized. A defacto approval does not meet that requirement. A trigger date for time frame, such as the + 30-day presumptive approval under 1.a-c of the stipulations, without the requirement for written response, and without opportunity to extend or modify the process or the time frame, will not comply with proper decision-making procedures and responsibilities.
4. The MOU improperly allows activities in anticipation of the construction of the rail line to proceed prior to a final decision authorizing or rejecting the PFS facility, which represents the sole destination of the rail line. Construction within the BLM right-of-way, prior to assurance that the facility will be authorized and built, constitutes unnecessary and undue degradation of federal lands and cannot be justified.
5. The entire process of planning, evaluating, and authorizing activities in anticipation of construction has failed to include or provide for participation by and regulatory authority of the Utah Department of Transportation (UDOT). State statute and rules require UDOT approval of all railroad crossings of roads. There are numerous roads which will be transected by the proposed rail line. Both the National Environmental Policy Act (NEPA) and BLM planning procedures require evaluation and consistency with State laws. This has not been accomplished.
6. The MOA purports to make statements about the effects of the proposed MOA on the government-to-government relationship among the federal agencies and the sovereign tribal entity. Although these statements may be true, the MOA does not accurately reflect United States Supreme Court law concerning the authority of the state of Utah within the boundaries of the reservation. The Supreme Court's case law authorizes state authority over non-Indians within the reservation, and for state taxation of non-tribal assets. In this regard, at a minimum, the entire MOA process does not require all relevant parties to insure that the requirements of state law concerning fees and taxes due by contractors are properly implemented.
7. The State Historic Preservation Officer further asserts that the MOA insufficiently delineates the Area of Potential Effect. The SHPO asserts that the NRC must consider the Dugway Proving Ground and the Air Force Test Range as eligible properties, as they

are vital World War II and Cold War sites which could be adversely affected by the proposed action.

8. Part X incorrectly delineates the responsibilities of the BLM, the SHPO, and the Advisory Council. The parties to the MOA have no authority to unilaterally redefine the correct relationship among these three entities. This clause would need to be rewritten at the proper time for execution of the MOA, if ever.

We appreciate the opportunity to comment, and your attention to these matters. If you have further questions, please contact me at (801) 538-1027.

Sincerely,



Lynne Ward

Acting State Historic Preservation Officer for the  
Private Fuels Storage Proposal

copies: US Department of Interior, BLM  
US Department of Interior, BIA  
US Surface Transportation Board  
Skull Valley Band of Goshutes  
Private Fuel Storage  
Advisory Council on Historic Preservation  
Confederated Tribes of Goshute Reservation  
Tribal Council of the Te-Moke Western Shoshone Indians of Nevada  
Utah Historic Trails Consortium  
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